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RE: Methanex Corporation v. The United States of America

Pursuant to Article 1128 of the NAFTA, the Government of Mexico ("Mexico") submit the following comments on certain interpretative issues arising in the instant claim. Mexico's submission is limited to certain issues. No inference should be drawn in respect of those issues not addressed by this Submission.

Mexico does not take a position on any issues of fact in this case.

I. PRINCIPLES OF TREATY INTERPRETATION

A. Effect of Agreement Amongst NAFTA Parties on Point of Interpretation

1. Mexico agrees with the United States that where there is agreement on a matter of treaty interpretation between the disputing NAFTA Party and the non-disputing NAFTA Parties through their Article 1128 submissions, this "'constitutes a practice … establish[ing] the agreement of the parties regarding [the NAFTA's] interpretation' within the meaning of Article 31(3)(b) of the Vienna Convention,"[1] and that such agreement is "authoritative"[2]. The Treaty has been negotiated and administered by the NAFTA Parties and their shared views, as all of the sovereign States party to the Agreement, should be considered authoritative on a point of interpretation.

2. The International Court of Justice has commented in this regard that:

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1 Respondent Memorial on Jurisdiction and Admissibility (November 13, 2000), at p. 13, citing Article 31(3)b) of the *Vienna Convention.*

2 Respondent Reply Memorial on Jurisdiction, Admissibility, and the Proposed Amendment (April 12, 2001), at p. 24.

> "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument".[3]

3. NAFTA Chapter Eleven Tribunals should be loath to diverge from such shared interpretations. As the drafters and signatories to the NAFTA, the Parties stand in a position to both articulate their intent, and to convey policy-based positions that will ensure its proper application, bearing in mind their shared interests in its long-term success and acceptance by the citizens of their respective nations.

4. Each Party seeks to ensure that its investors receive the appropriate level of protection in each of the other Parties as intended by Chapter Eleven. Each necessarily balances its interests (the protection of its investors vs. the level of its exposure to claims) when formulating its position on interpretative issues. For these reasons, where all three Parties clearly agree on a particular point, their views should be considered highly authoritative by Chapter Eleven Tribunals.

II. SCOPE OF MEASURES COVERED BY CHAPTER ELEVEN: ARTICLE 1101 AND THE "RELATING TO" REQUIREMENT

5. Under the heading "Scope and Coverage", the first article of Chapter Eleven establishes the breadth of measures that are covered by the chapter, and, by definition, the range of measures that are arbitrable under Section B:

> **Article 1101: Scope and Coverage**
>
> 1. This Chapter applies to measures adopted or maintained by a Party *relating to*:
>
> (a) investors of another Party;
>
> (b) investments of investors or another Party in the territory of the Party; and
>
> … [emphasis added]

6. The United States contends that this language requires that there be a "legally significant connection between the complained of measures and the specific investor ... or its investments"[4], and that Methanex has failed to establish this required nexus in respect of the impugned measures. The Claimant maintains that the "appropriate standard for 'relating to' is whether the measure 'affects' the investor or its investments"[5].

7. Mexico agrees with the position of the United States, and disagrees with Methanex's contention that measures that merely "affect" investors or investments are covered by Chapter Eleven. The phrase "relating to" must be given its distinct meaning, particularly in light of the how the NAFTA and other international trade agreements distinguish between the terms "relating to" and "affect". At the time the NAFTA was negotiated, GATT jurisprudence[6] drew this distinction. It must be taken that the NAFTA negotiators deliberately selected "relating to" in Article 1101 in order to require something more that a mere "effect" in order before measures

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3 *Advisory Opinion on the Status of South West Africa*, I.C.J. Reports, 1950, p. 129 at p.135.

4 Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility, and the Proposed Amendment at p.44.

5 Claimant Methanex Corporation's Counter-Memorial on Jurisdiction, at p. 47 (subheading A.).

6 See, for example, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted on March 22, 1988, L/6268, GATT (35) B.I.S.D. (1989); *United States – Standards of Reformulated and Conventional Gasoline,* WTO Doc. DSS/AB/R (May 20, 1996); and *United States – Prohibition of Shrimps and Certain Shrimp Products*, WTO Doc. WT/DS58/AB/R (October 12, 1998).

could be arbitrable under Chapter Eleven[7]. This point is clear when one reviews other provisions of the NAFTA itself where the modifier "affect" is used in lieu of "relating to" in order to indicate a broader scope of obligation[8].

8. The significance of this distinction to Chapter Eleven tribunals is that measures that "relat[e] to" investors or investments have a closer degree of connection than measures that merely "affect" them. Under the GATT jurisprudence (see footnote 6 for citations), the test adopted for the measure to be found to be "relating to" was that of being "primarily aimed at". The test adopted for the purposes of Article 1101 must reflect the NAFTA drafters' intent to require a more direct nexus between the measure and the investor or its investment than mere effect, as evidenced by the text's considered use of "relating to".

III. FAIR AND EQUITABLE TREATMENT UNDER ARTICLE 1105

9. Mexico concurs with the United States that Article 1105 establishes only an international minimum standard of customary international law in which "fair and equitable treatment" is subsumed. All three NAFTA Parties have clearly so stated in their respective submissions in other Chapter Eleven cases in which the matter has arisen.

10. For example, both Mexico and Canada did so before the British Columbia Supreme Court in Mexico's application to set aside the Metalclad Award. On May 2, 2001, that Court issued its judgment which partially set aside the Award. In so doing, it explicitly rejected the decision in Pope & Talbot[9] insofar as that Tribunal had concluded that "fairness" is an additional element to the minimum standard:

> With respect, I am unable to agree with the reasoning of the Pope & Talbot tribunal. It has interpreted the word "including" in Article 1105 to mean "plus", which has a virtually opposite meaning. Its interpretation is contrary to Article 31(1) of the Vienna Convention, which requires that terms of treaties be given their ordinary meaning. The evidence that the NAFTA Parties intended to reject the "additive" character of bilateral investment treaties is found in the fact that they chose not to adopt the language used is such treaties and I find it surprising that the tribunal considered that other evidence was required.[10]

11. Mexico notes that the United States and Mexico adopted this view in their Submissions before the Pope & Talbot Tribunal, which, in turn, were expressly adopted by Canada. That Tribunal's refusal to adopt the Parties' shared view can only be regarded as perverse. As explained above, the shared view of the NAFTA Parties as to the interpretation of a NAFTA provision should be applied by Chapter Eleven Tribunals, in accordance with the Vienna Convention, which they are bound to apply.

12. The reasoning of the Pope & Talbot Tribunal has not only been rejected by a reviewing court and all the NAFTA Parties, but also belies the plain reading of the language of Article 1105 which clearly indicates that both "fair and equitable treatment" and "full protection and security" are included examples of the customary minimum standard, subsumed therein, and in no way add to it.[11] This was recognized by Dolzer and Stevens in Bilateral Investment Treaties (1995) [12]. In

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7 For a comprehensive discussion of this point, including the GATT jurisprudence, see J.C. Thomas, "Investor-State Arbitration under NAFTA Chapter 11" (1999) The Canadian Yearbook of International Law 1999 at pp. 127 – 130.

8 See for example articles 709 and 901 for "affect" and 701 an 1201 for "related to".

9 The *Pope & Talbot* Award on the merits was issued on April 10, 2001. Counsel for Metalclad Corporation provided a copy of it to the British Columbia Supreme Court judge hearing Mexico's application to set aside (Mr. Justice D. Tysoe).

10 *The United Mexican States v. Metalclad Corporation,* Supreme Court of British Columbia, 2001 BCSC 664 (May 2, 2001) at p.24.

11 **Article 1105: Minimum Standard of Treatment**

the context of their discussion of the terms "fair and equitable treatment" and the fact that in some BITs fairness is an additional element, they conclude the following vis-à-vis NAFTA Article 1105:

> "However, in the North American Free Trade Agreement (NAFTA), the fair and equitable treatment standard is explicitly subsumed under the minimum standard of customary international law." (p.60)

13. Mexico cautions against the reliance upon the writings of academics (particularly writings that predated and did not consider the specific text of the NAFTA) to support claims of inordinately expansive formulations of the NAFTA's investment protections. In principle, the approach is unsound. Treaty-based investment protections are drafted by States for their benefit (and the benefits of their investors) and it is their intentions which must be given effect.

14. Mexico also concurs with, and adopts, the submissions of the United States at pages 30-33. As Article 1105 incorporates customary international law only, conventional international law rights and obligations, such as those found in the rest of the NAFTA or the WTO Agreements, are not incorporated in Article 1105. The point was made by the reviewing court in Metalclad:

> 62. …In using the words "international law", Article 1105 is referring to customary international law which is developed by common practices of countries. It is to be distinguished from conventional international law which is comprised in treaties entered into by countries (including provisions contained in the NAFTA other than Article 1105 and other provisions of Chapter 11).[13]

15. Moreover, the effect of accepting Methanex's submission would be to rob Articles 1116 and 1117, which set out the jurisdiction ratione materiae of a Chapter Eleven tribunal, of any meaning and effect. The express limiting of the jurisdiction of tribunals to Section A and Article 1502(2) and (3)(a) would be rendered of no effect if any other article of the NAFTA (or for that matter, the WTO or any other treaty) could simply be read into Article 1105. This is contrary to the principle of effectiveness in treaty interpretation.

16. On the basis of the Metalclad judgment, Mexico believes that a tribunal that read conventional international law obligations such as the WTO Agreements into the customary international law content of Article 1105 would act in excess of jurisdiction.

17. For these reasons, Mexico agrees with the United States on this fundamental point.

IV. DEFINITION OF "INVESTMENT" UNDER CHAPTER ELEVEN

18. In its Counter-Memorial on Jurisdiction, Methanex includes in its identification of its investments "market shares" and "goodwill" and contends that these are intangible assets and "investments" which are capable of being expropriated under NAFTA (pp.17-19). In support thereof, it relies on the definition of "investment" under Article 1139, and of the decisions of Pope & Talbot and S.D. Myers.

19. Insofar as these intangibles are concerned, Mexico disagrees. At best, these are the intended results of investments, and their existence in and of themselves do not answer the threshold question as to the presence of an investment as defined in Article 1139. This definition, while inclusive of several categories, is also exhaustive. This is evident from the fact that the definition under Article 1139 commences with the phrase "investment means … " followed by a list from (a) – (h). The NAFTA distinguishes between defined terms whose meaning is fixed, and terms where the drafters have permitted some flexibility in interpretation. In the latter

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1. Each party shall accord to investments of another Party treatment in accordance with international law, *including* fair and equitable treatment and full protection and security. [emphasis added].

12 Dolzer, Rudolf and Stevens, Margrete, *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, 1995.

13 Supra, note 10 at paragraph 62.

case, inclusive rather than exhaustive terminology is used. An example is the definition of measure in Article 201 (for the purposes of Chapter 11 and otherwise) which commences with "measure includes …".[14]

20. None of the listed assets and interests in the definition of "investment" under Article 1139 includes goodwill and market share.

21. Mexico adds that to the extent that the decisions in Pope & Talbot and S.D. Myers can be interpreted as supporting Methanex's position, they are incorrect and should not be followed because they failed to interpret Article 1139 correctly.

V. GENERAL COMMENT ON OTHER CHAPTER ELEVEN CASES

22. In support of certain of its contentions, the Claimant has cited S.D. Myers, Inc. v. Canada, Metalclad Corporation v. United Mexican States, Pope & Talbot v. Canada and Ethyl Corp. v. Canada. Mexico submits that these decisions are of no or little assistance for a number of reasons.

23. As to Metalclad, as was noted above, that Award has not only been partially set aside, but has had the vast majority of its reasoning eviscerated as a result of that Tribunal's approach to interpretation which caused it to lose jurisdiction. What remains of the Award are three paragraphs as to the effect of a particular Decree at issue which was found to have been an expropriation. Beyond that limited finding in that limited context (which was not accompanied by any serious analysis of expropriation or any other provisions of Section A of Chapter Eleven), the Award has been set aside.

24. As to S.D. Myers, Canada has applied to set it aside in Federal Court in Canada. Moreover, each of the NAFTA Parties has taken issue with certain aspects of its rulings in various proceedings.

25. Likewise, Mexico agrees with the Respondent that the most recent Award in Pope & Talbot[15] is unconvincing and based on erroneous statements of fact. In particular, the Tribunal studiously ignored the shared views of the Parties as to the scope and meaning of Article 1105. Moreover, the Tribunal itself acknowledged that it was going beyond (and contrary to) the plain language of the treaty in concluding that the notion of fairness in Article 1105 was "additive" (paragraph 111):

> Another possible interpretation of the presence of the fairness elements in Article 1105 is that they are additive to the requirements of international law It is true that the language of Article 1105 suggests otherwise, since it states that the fairness elements are included within international law. (Emphasis added.)

26. Having explicitly failed to give effect to the plain language of the treaty, the Award (at least in relation to Article 1105) can be of no assistance to subsequent tribunals. In addition, the Pope & Talbot Award misstated Mexico's position in relation to its concurrence with statements made by the United States and Canada in respect of Article 1105, and, as a result, Mexico requested the Tribunal to issue a corrigendum[16].

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14 **Article 1139: Definitions**

investment *means*:
(a) an enterprise;
(b) etc. [emphasis added]

Article 201: Definitions of General Application

measure *includes* any law, regulation, procedure, requirement, or practice; [emphasis added]

15 Award of April 10, 2001.

16 By letter dated April 30, 2001, the Presiding Arbitrator declined to issue the requested *corrigendum*. In so doing, however, he acknowledged that the NAFTA Parties had a shared view as to the interpretation of the terms of Article 1105.

27. As has already been noted, the court reviewing the Metalclad Award unhesitatingly rejected the Pope & Talbot Award as having any persuasive effect in respect of its treatment of Article 1105.

28. As to Ethyl (which is asserted by Methanex as "involv[ing] facts very similar to those here…."[17]), it must be remembered there was no Award on the merits of the claim, and it is of no guidance in this proceeding on non-procedural matters. In the absence of any factual and legal findings, let alone a Final Award, any speculation as to the reasons behind Canada's settlement of the claim does not assist this Tribunal.

All of which is respectfully submitted

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17 At page 40 of the Claimant's Amended Claim.